AN ARGUMENT OF A Learned JUDGE IN THE EXCHEQUER-CHAMBER UPON A Writ of Error Out of the KING'S-BENCH, In a CAUSE,

Wherein Sir *Samuel Barnadiſton* was Plaintiff againſt Sir *William Soame*, Sheriff of the County of *Suffolk*, Defendant, Wherein the Privilege of the Houſe of Commons, in Determining Matters relating to the Right of Elections of their own Members, is juſtified.

Neceſſary for all Perſons that have any thing to do with ELECTIONS.

From the Original MS.

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THE Argument, &c.

THE Plaintiff brings an Action upon the Caſe *in Banco Regis* againſt the Defendant, late Sheriff of *Suffolk*, ſetting forth, that a Writ iſſued for the Chooſing of a Knight for that County to ſerve in the then Parliament inſtead of Sir *Henry North*, deceaſed, That at the next County Court the Freeholders proceeded to an Election; and altho' the Plaintiff was duly choſen *per majorem numerum Gentium tunc reſident. infra dictum Comitatum, quorum; tunc quilibet expendere potuit* 40 s. *lib. Tenement. & ultra per Annum infra Comitat' illum, ac licet prædictus* Willielmus *premiſſa ſatis ſciens poſtea Breve. prædict. in Cur' Cancellar' retornavit, ſimul cum quadam Indentura int' ipſum Vicecomitem & prædict. Electores ipſius* Samuelis *de prædicta Electione ipſius* Samuelis *fact' ſec' exigentiam Brevis prædict. Prædict. tamen* Willielmus *ad hunc Vicecomes Officii ſui debitum minime ponderans, ſed Machinans & Malitioſe intendens ipſum* Samuelem *in hac parte minus rite per prægravare & eundem* Samuelem *de fiducia unius* Mil. *Com' prædict. in dict. Parliamento exercend' omino fruſtrare & deprivare, & prædict* Samuelem *ad diverſas magnas & grandes Pecun' Summas expendend' cauſare contra Debitum Officii ſui prædict. Falſo, Malitioſe & Deceptive ad tunc in eadem Cancellar. apud* Weſtm. *prædict. retornavit una cum Indentura præd. quandam al' Indentur' eidem Brevi ſcilicet annex. ſpecificans illam forefact' int' præfat'* Willielm' *&c. ex una parte & diverſas al' perſonas dict' Comitat' in Indentur' ill' ſpecificat' & content' qd. dict. al' perſonæ & Major pars totius Com' præd. in præd. pleno Comitat' elegerunt quendam* Lionellum Tallmaſh *Bar. al' dict. Dom.* Huntingtowr *in Regno* Scotiæ. Henrici North *un' Mil. Com.* Suff. *prædict. pro Parliament. prædict. adveniend. eidem Parliamento pro Com. illo. Ubi revera prædictus* Lionellus *non fuit Electus per Majorem partem prout per ult. Indentur' falſo ſupponitur Ratione cujus quidem falſi retorn. de prædict. al' Indentur' & c. idem* Samuel. *in domum inferiorem pro Communitat. hujus Regni* Angl. *&c. Aſſemblat. admitt' non potuit, quouſq; idem* Samuel. *per Petitionem ſuam Communitat. dict. Parliamenti pro remedio congruo exhibit. & poſt diverſas ingentes denar' Summas in & citra manifeſtationem & verificationem dict. Electionis coram dict. communitat. expendit. & diverſos labores in ea parte ſuſtent. poſtea ſcil. &c. communitat. in domum communit. prædict. admiſſus fuit & Elect. ipſius* Samuel *per communitat. declarat. fuit fore bona unde deteriorat, eſt & damn. habet. ad valen.* 3000 l.

There is a Verdict for the Plaintiff, and Damages found to the value of 800 *l.* and Judgment thereupon, and a Writ of Error is brought to Reverſe that Judgment.

I have but little Time left to ſay what I have to offer, it being very Late; and yet I muſt deſire leave to produce thoſe Reaſons, I have in Maintenance of my Opinion; I will be careful not to detain you longer than will be neceſſary.

And therefore I will not trouble you with Stating the Caſe again, nor will I ſpeak of any Exceptions that have been made to the Declaration, for I love not the Niceties of the Law in Caſes where they do prevail; And in this Caſe I have only conſidered the Foundations of the Action; which if I had found well eſtabliſhed upon Reaſon, or the Grounds of the Law, I would have examined what has been objected to the Forms of Declarations, which muſt have brought great Weight to have over-turn'd theſe Proceedings.

But as to the Point of the Action, upon the moſt ſerious Conſideration I would have of it, and weighing what hath been before now, and alſo at this time, ſaid in ſupport of it; I am of Opinion that the Judgment ought to be Reverſed; for that no ſuch Action as this, at Bar, does lye by the Common-Law

Becauſe this is a Cauſe of conſiderable Value, great Damages being Recovered; becauſe it is a Judgment of great Authority, being upon a Cauſe Tryed at the *King's-Bench*-Bar, and given upon Deliberation there; becauſe it is a Caſe of an extraordinary Nature, and of great Import, each Party pretending Benefit to the Parliament; becauſe it is an Action *Primæ Impreſſionis*, that never was before Adjudged, the Report of which will be liſtned after; I have taken Pains to collect and ſet down the Reaſons, that I muſt go upon in determining this Caſe; that as the Judgment had the Countenance of ſome Deliberation in the Court where it was given; ſo the Reverſal being with greater Deliberation, may appear grounded upon Reaſons that ought to prevail.

I can ſay with my Brother *Wyndham*, that I love rather to affirm Judgments, then to reverſe them; but I can attribute nothing of Authority to the Judgment, tho' it were given in a Superior Court, and upon Deliberation. I muſt Judge of it as if the Caſe came to be Judg'd originally by me: The Argument to ſupport a Judgment from the Authority of it ſelf, is, *Exceptio ejuſdem rei cujus petitur Diſſolutio*, which ought not to be admitted in Caſes of Writs of Error. We are intruſted to Examine and Correct the Errors of that Court, and for that purpoſe we are made Superior to it; we muſt proceed according to our own Knowledge and Diſcretion, or elſe we do not perform the Truſt Repoſed in us.

I muſt needs ſay this is a Cauſe that imports it more then any Cauſe I have known to come before us, for it is a Cauſe *Primæ Impreſſionis*; and the Queſtion is, whether by this Judgment a Change of the Common-Law be introduced. It is the Principal Uſe of Writs of Error, and

Appeals

Appeals to hinder the Change of the Law; therefore do Writs of Error in our Law, and Appeals in the Civil Law, carry Judgments and Decrees to be Examin'd by Superior Courts until they come to the higheſt, who are entruſted that they will not change the Law.

Therefore do Writs of Error lye from *Ireland*, which is a Subordinate Kingdom to *England*, by whoſe Laws it is governed; that they might not be able to change the Law by their Judgments, and not ſo much for the particular Right of the Party.

For otherwiſe it wou'd be very eaſy for Judges by Conſtruction and Interpretation to change even a Written Law, and it would be moſt eaſy for the Judges of the Common-Laws of *England*, which are not Written, but depend upon Uſage to make a Change in them, eſpecially if they may juſtify themſelves by ſuch a Rule as my Brother *Atkyns* lays down to ſupport this Caſe; *viz.* That the Common-Law complies with the Genius of the Nation. I admit that the Laws are fitted to the Genius of the Nation; bnt when that Genius Changes, the Parliament is only intruſted to Judge of it, and by changing the Law to make it ſuitable to it: But if Judges ſhall ſay it is Common-Law becauſe it ſuits with the Genius of the Nation; they may take upon 'em to change the whole as well as any part of it, the Conſequence whereof may eaſily be ſeen; I wiſh we had not found it by ſad Experience.

If the Caſe at the Bar be a Change of the Law, it is happy it comes to be queſtion'd in the firſt Inſtance; for if this Cauſe had been any way agreed and quieted, and a ſecond Caſe of this Nature had been queſtioned, there wou'd have been a Preſident urg'd, which cannot be ſpoke of here; for this Caſe hath no Fellow, there never having been the like Judgment before.

The Method I ſhall take in what I have to ſay ſhall be,

1ſt, To Remove ſome prejudice the Caſe is under.

2dly, Give my Reaſons againſt the Action.

3dly, Weigh what hath been ſaid to maintain the Action.

1ſt. The Caſe is under this Prejudice, That an Action of the Caſe lyes for falſe Returns of Sheriffs, and why ſhould it not lye in this Caſe as well as any other.

To Remove this Prejudice I ſhall ſhew ſome material Differences betwixt the Nature of Ordinary Returns and this Return.

In Ordinary Returns the Party is Concluded, and abſolutely without Remedy; for the Court muſt take the Return as the Sheriff makes it. In Ordinary Caſes the Sheriff may, and frequently does, take Security of the Plaintiff, or the Sheriff hath means by Law to be Secure; as if he doubts the Property of the Goods, he may return upon a *fieri facias*, *Nullus venit ad monſtrandum bona.* In ſome Caſes he may for his ſafety, Impannel a Jury, as upon an *Elegit*, or he may Reſort to the Court, and pray reaſonable Time to prepare his Return, if the Matter be difficult; and hath other ſhelters, that if he be wary, will ſave him from Danger.

But

But in this Caſe the Party is not Concluded, for upon a Petition to the Parliament, if they ſee it Juſt, they will cauſe the Return to be alter'd by the Clerk of the Crown, if the Sheriff be not in the Way; in this Caſe the Sheriff may not take Security, it were Criminal in him to make ſuch a Return by Compact, nor can the Sheriff make a Fruitleſs Return, or obtain Delay to conſult his Safety.

Theſe Differences are of that Nature, that they change the Caſe in the Reaſon of it, as I ſhall hereafter make appear: And no Man can infer becauſe an Action lyes for falſe Returns in Ordinary Caſes; therefore it lyes in Caſe of a Return to Parliament, where the Sheriff is clearly upon Terms.

My Reaſons againſt this Action are applicable to this Caſe, and make it different from all the Caſes that have been put by my Brothers that Argued for the Action: I obſerve they Argued only upon Generals, without any other Application to this Caſe than by the Topick of concluding a *Minori ad Majus*, becauſe Actions lay in Caſes of Inferiour Nature, therefore it will lye in this; which Rules hold not in diverſe Caſes where there are particular Reaſons to the contrary, as I ſhall by and by ſhew to be in this.

2*dly*, I ſhall give you my Reaſons againſt this Action, which are as follow.

1*ſt*. My firſt Reaſon is this, becauſe the Sheriff as to the declaring the Majority is Judge, and no Action will lye againſt a Judge; for what he does Judicially, tho' it ſhould be laid *Falſo, Malitioſe & Scienter*, as appears in *Co.* 12 *Rep.* fol. 24. *They who are intruſted to Judge, ought to be free from Vexation, that they may Determine without Fear; the Law requires Courage in a Judge, and therefore provides Security for the Support of that Courage.* But,

1. Is the Sheriff a Judge in this Caſe? And

2. Is there the ſame Reaſon he ſhould be freed from all Actions?

As to the Firſt, it is of Neceſſity, that as to the declaring the Majority, he ſhould be the Judge upon the Place, in other Caſes in the County Court; the Free Suiters are the Judges, and he is the Miniſter: When we ſay the Free Suiters, we mean the Major part of them is to Judge; but when the Queſtion is, which is the Major Part, they cannot Determine the Queſtion; but of Neceſſity the Sheriff muſt determine that, the Nature of the thing ſpeaks it.

Therefore it was held rightly in *Letchmer*'s Caſe, 13 and 14 *Car.* 2. that as to the Election of Knights to the Parliament, the Court is properly the Sheriff's Court, and the Writ is in the nature of a ſpecial Commiſſion, *Elegi facias.*

I know a Judge may have many Miniſterial Acts Incumbent upon him, as the Chief Juſtices have to certifie Records upon Writs of Error; Therefore it is neceſſary for me to obſerve, that the Suit here is for what he does as a Judge, and not for any thing Miniſterial that appears by the Averment, that the Sheriff annexed another Indenture, ſpecify-

ſpecifying to be made by the Major part of the Freeholders, and containing that the Lord *Huntingtowr* was Choſen, *Ubi re vera*, The Lord *Huntingtowr* was not Choſen by the Major part of the Freeholders. If it had been ſaid *ubi re vera*, the Freeholders ſuppoſed to Seal the ſame, never did Seal the ſame, there had been a falſity in his Miniſterial part of ſending in the Indenture; but his ſending Two Indentures, which were really Sealed by the Freeholders, as they import; wherein the Freeholders of each Indenture (and not the Sheriff) ſay that they are the Major part, is no falſity in his Miniſterial part, but only defering to Judge between them, which is the Major part, or more properly judging that they are both equal in Number.

They Object that the Matter of this Queſtion is not matter of Judgment, 'tis but counting the Poll, which requires Arithmetick, but not Judgment; but certainly if it be rightly conſider'd, it will be thought this Queſtion of Majority is not barely a Queſtion of Fact, but a Queſtion of Judgment, a Queſtion of Difficult Judgment, there are ſo many Qualifications of Electors.

1. They muſt have 40 *s per Annum*, there the Value muſt be judged.
2. It muſt be Freehold; there the Title
3. It muſt be their own; there colourable and frandulent Gifts made many times on purpoſe to get Voices, muſt be Judged.
4. The Electors muſt be Reſident; there the Settlement of the Party muſt be Determin'd.
5. There are many things that incapacitate Voices, as Bribery, Force, *&c.* and many other Queſtions ariſe, that are of ſuch Difficulty, that in Debate of them, much time is ſpent in Parliament; and ſometimes a Committee Determines one way, and the Houſe another. Is not this then a Queſtion that refers to Judgment?

They Object again, the Sheriff may give an Oath concerning all the Qualifications, and he is to look no further.

I Anſwer, The Statute has given the Sheriff Power to give an Oath in Aſſiſtance of him; but the Statute does not ſay that whoſoever takes that Oath ſhall have a Voice: Neither does the Statute 23. H. 6. ſay that the Sheriffs ſhall not be charged with a Falſe Return that purſues that way; ſo that altho' he may uſe thoſe Means for his Direction, yet he muſt conſider his own Safety, and not make a Falſe Return; if a Man upon taking ſuch an Oath, give the Sheriff a ſpecial Anſwer, or it ſhould be known to the Sheriff he Swears Falſe; the Sheriff muſt Determine according to his own Judgment, and not by what is Sworn.

It may hence be concluded that the Sheriff, as to declaring the Majority, is a Judge; and if ſo, my next Aſſertion is, That there is the ſame Reaſon he ſhould be free from Actions, as any Judge in *Weſtminſter-Hall*, or any other Judge. Does it not Import the Publick that the Sheriff ſhould deal uprightly and impartially? Ought he not to have Courage, and for that End ſhould not the Law provide him Security?

Conſider his Diſadvantages, what a Noiſe and Crowd accompany ſuch Elections; what Importunity, nay what Violence there is upon him from the Conteſting Partys.

We may ſay no other Judge has more need of Courage and Reſolulution to manage himſelf, and Determine uprightly, than he. No other Judge Determines in a Caſe of greater Conſequence to the Publick, or Difficulty than he; Expoſe him to ſuch Actions, and in moſt Elections he muſt have Trouble; for commonly each Party is Confident of his Strength, his Conduct and his Friends; that let the Sheriff Return never ſo uprightly, the Party that is Rejected will Revenge it by ſuch, eſpecially if he may Sue at Common-Law, to have boundleſs Damages, without running any Hazard himſelf, but of the Loſs of his Coſts.

If we Judges that find our ſelves Secure from Actions, ſhould not be tender of others, that are in the ſame Circumſtances. It may well be ſaid, *Wo unto you, for you impoſe heavy Burthens upon others, but will not bear the leaſt of them your Selves.*

2. My Second Reaſon is, becauſe it is *alieni fori*, either to examine the Right of the Election, or Behaviour of the Sheriff; both which are Incident, and indeed the only Conſiderations that can guide in the Tryal of ſuch Cauſes, if they be allowed.

It is admitted that the Parliament is the only proper Judicature, to determine the Right of Election, and to cenſure the Behaviour of the Sheriff. How then can the Common-Law Try a Cauſe, that cannot Determine of thoſe Things, without which the Cauſe cannot be Try'd?

No Action upon the Caſe will lie for Breach of the Truſt, becauſe the Determination of the Principal Thing, the Truſt, does not belong to the Common-Law, but to the Court of *Chancery*: Certainly the Reaſon of the Caſe at Bar is Stronger, as the Parliament ought to have more Reverence than the Court of *Chancery*.

They Object that it may be Tryed after the Parliament hath Decided the Election; for then that which the Common-Law could not try is Determined, and the Parliament cannot give the Party the Coſts he is put unto.

Then I perceive they wou'd have the Determination of the Parliament binding to the Sheriff in the Action, which it cannot be; for that is between other Parties to which the Sheriff is not call'd: It is againſt the Courſe of Law, that any Judgment, Decree or Proceeding betwixt other Parties ſhould bind the Intereſt of, or any way Conclude a Third Perſon; no more ought it to do here, it may be eaſy for Parties combining to repreſent a Caſe ſo to the Parliament, that the Right of Election may appear either way as the Parties pleaſe. It is fit the Sheriff, who is not admitted to controvert ſuch Determination, ſhould be Concluded by it, in an Action brought againſt him to make him pay the Reckoning.

Did the Parliament believe, when then they Determined this Election, that they paſs'd Sentence againſt the Sheriff, upon which he muſt pay

800 *l.*

800 *l.* Sure if they had imagin'd ſo they would, nay in Juſtice they ought to have heard his Defence before they Determin'd it?

And yet that was the Meaſure of this Caſe, the Sheriff was not heard in Parliament, indeed he was not blam'd there, and yet upon the Tryal which concern'd him ſo deeply, he was not allow'd to defend himſelf by any Majority or Equality of Voices, the Parliament having Determin'd the Election.

I do not by theſe Reflections Tax the Law of Injuſtice, or the Courſe of Parliament of Inconvenience; I am an Admirer of the Methods of both, it is from the Excellency of them I conclude this Proceeding in this new fangled Action, being Abſurd, Unjuſt and Unreaſonable, cannot be Legal.

To Anſwer the other Branch of this Objection, I ſay it does not follow; that becauſe the Parliament cannot give Coſts; therefore this new deviſed Action muſt lie to help the Party to them.

For then ſuch an Action might as well lie in all Caſes, where there is a Wrong to be Remedyed by Courſe of Law, and no Coſts are given for it.

At the Common-Law no Coſts were given in any Caſe, and many Caſes remain at this Day where the Statutes have given no Coſts, as in a Prohibition, *Scire facias*, and *quare impedit*, and divers other Caſes; and yet no Action will lie to recover thoſe Coſts, and why ſhould it lie in the Caſe at Bar?

In this Caſe the Parliament have already had it under their Conſideration in the *Statute* 23. H. 6. and have appointed what ſhall be Paid by the Sheriff that offends, *viz.* 100 *l.* to the Party, 100 *l.* to the King, and Impriſonment; the Parliament have Stated what ſhall be paid for Compenſation, and what for Puniſhment, and would have provided for Coſts if they had thought fit.

3. My Third Reaſon is, becauſe a Double Return is a lawful Means for the Sheriff to perform his Duty in doubtful Caſes.

If this be ſo, then all Aggravations of *Falſo Malitioſe & Scienter* will not make the thing Actionable; for whatever a Man may do for his Safety cannot be the Ground of an Action.

There is ſometimes *Dammum abſq; Injuria*, tho' the thing be done on purpoſe to bring a Loſs upon another, without any Deſign of Benefit to himſelf; as if a New Houſe be Erected Contiguous to my Ground, I may Build any thing on purpoſe to blind the Lights of that New Houſe, and no Action will accrue, tho' the Malice were never ſo great; much leſs will it lie where a Man acts for his own Safety.

If a Jury will find a Special Verdict; if a Judge will Adviſe and take time to Conſider; if a Biſhop will Delay a Patron, and Impannel a Jury to enquire of the Right of Patronage, you cannot bring an Action for theſe Delays, tho' you ſuppoſe it to be done Maliciouſly, and on purpoſe to put you to Charges; tho' you ſuppoſe it done *Scienter*, knowing the Law to be clear; for they take but the Liberty the Law has provided for their Safety, and there can be no Demonſtration that

they have not real Doubts, for they are within their own Breasts: It would be very Mischievous that a Man might not have leave to Doubt without so great Peril.

The Course of Parliament makes out the Ground of this Reason to be true in Fact, so that a Double Return is lawful when the Sheriff Doubts; for if the Parliament did not allow a Double Return in Doubtful Cases, they ought never to accept a Double Return: If it were in it self a void and unlawful Return, they ought not to endure it a Moment, but send for the Sheriff and compel him to make a single Return; but we see where there is Doubt, the Parliament sends not for the Sheriff before they have Examin'd the Case, and give particular Directions.

And it must of Necessity be the Course, for suppose the Voices are Equal; suppose the Election is Void for Force; Suppose the Sheriff Doubts upon the Validity of some Voices, shall he Transmit his Doubts, specially to the Parliament? Was there ever any such thing done? Was there ever any other way but to make a Double Return, and leave it fairly to the Decision of the Parliament?

It was said by my Brother *Ellis*, that if the Sheriff had Return'd in the Nature of a Special Verdict, the Special Matter, and had concluded in this manner, (*viz.*) If the Parliament shall Adjudge Sir *Samuel Bernardiston* to be Chosen, then he Returns him, and if the Parliament shall Adjudge the Lord *Huntingtowr* to be Chosen, then he Returns him, that such a Return as this had been Safe, and cou'd not have born an Action.

This is a pretty Invention found out for Argument sake, but methinks it Furnishes no Force at all to the Part for which it is brought, but rather shews the Right to be the other way; for let any Man of Reason say, whether a Double Return, as it is now used, be not the same thing in Consequence; Is not a Double Return as if the Sheriff should say to the Parliament (the Right of Election is between these Two, I am in Doubt which of them I shall Reject, and expect your Directions) this is the Import of a Double Return, and is the same in Effect, as if it had Concluded in a Special Verdict, and so my Brother *Ellis*'s Instance should not be Actionable tho' he Concluded otherwise.

That other new fangled could not be receiv'd. — For,

1. *The Freeholders would never joyn in such a Return.*
2. *Such a Return is not capable of being Amended by the Sheriff.*

But the Judgment of the Parliament must be Enter'd upon Record to make it any Return, it concluding nothing of it self, as a special Verdict concludes, till the Judgment of the Court be Enter'd upon the Roll.

3. *The Parliament will not, as I believe, admit of new Devices in the Course of their Proceedings, whatever we do at Law.*

But the Double Return is Practicable in the Country, for the Freeholders of each Part will Tender their Indentures; and it is easily Amended in Parliament by Rejecting the Indenture of those Freeholders that were not the Major Part, which way has been Practis'd in doubtful Cases for many years.

So,

So that I apprehend the Caſe at Bar to be more regular and favourable, than that Caſe which my Brother *Ellis* put as a Caſe that would not bear an Action.

Again; Suppoſe the Sheriff had inform'd the Parliament of his Doubts, and that he could not readily determine where the Majority was, but it was betwixt two Perſons, *A.* and *B.* and thereupon deſir'd their Favour either to grant him Time to Determine it, if they pleas'd to Command him ſo to do, or elſe, that they would Decide it themſelves, and he would obey what Directions they ſhould make in it, and thereupon the Parliament had taken upon themſelves to determine it.

This moſt clearly had not been Actionable, for it is not Actionable to delay a Return, to any Court of Juſtice, where the Sheriff hath Leave from the Court ſo to do.

A double Return, in my Underſtanding ſpeaks the ſame thing, to the Parliament, and upon it they may either direct the Sheriff to make a ſingle Return, which is to cauſe him to decide it, or they may do it themſelves.

And here I muſt needs reflect upon the ſecond Reaſon I have againſt this Action, that the Matter of it is *alieni fori*; I find my ſelf and my Brothers that Argued for the Action, engag'd in a Diſcourſe of the nature of a double Return, and the Courſe of Parliament upon it, which, as a Judge I cannot ſo well ſpeak to; I had the Honour to be of this Houſe of Commons, and whilſt I was there, I conſidered as well as I cou'd the Courſe of the Proceedings of the Houſe, and am therefore able to ſpeak ſomething of them, and I am brought into this Diſcourſe neceſſarily by this Action; But I muſt needs ſay it is an improper Diſcourſe for Judges, for they know not what is the Courſe of Parliament, nor the Privilege of Parliament. When the Lords in Parliament, whom they are bound to aſſiſt with their Advice, aſk the Juges any thing concerning the Courſe or privilege of Parliament, they have anſwer'd, that they know them not, nor can adviſe concerning them.

If in Parliament we do not know nor can adviſe concerning theſe things, How can we judge people upon them out of Parliament, we ought to know before we judge, and therefore we cannot judge of things we cannot know.

Our being engag'd in a Diſcourſe improper for Judges, ſhews the Action to be improper, as much as any other Argument that can be made, and this Argument ariſes from my Brothers that argued for the Action.

But now I am in this Diſcourſe, I muſt go a little farther; My Obſervation from the Courſe of Parliament has been, that they will not permit the Sheriff to delay his Return, to deliberate, and he cannot take Security of either Party; and if a ſingle Return be not juſtified by the Committee of Elections, he is danger of the Statute of 23. *H.* 6.

It follows that there is no ways for an innocent Sheriff to be ſafe, where he conceives Doubt, but in making a double Return, and if that ſhould be Actionable too, the Service of the Parliament would be the moſt ungrateful Service in the World.

It ſeems ridiculous to me that it ſhould be objected, that this Courſe

of Law is neceſſary to prevent the great Miſchief ariſing from double Returns, when, as if it be a Miſchief, or diſlik'd by the Parliament, either in General or any Particular Caſe; they may Reject them when they pleaſe, and Command the Sheriff to make a Single Return; ſo they may Remedy it by their Practice, without their Legiſlative Power.

Their Practice hitherto hath been to receive Double Returns, which therefore in ſome Caſes muſt be lawful, and in this very Caſe the Double Return was accepted, and the Sheriff no way Puniſh'd for it; which he ought to have been, if he had been Blameable.

If Double Returns are accepted by Parliament, they are allow'd, and we muſt ſay they are lawful, which is the Ground of my Third Reaſon; for which I hold this Action not Maintainable,

4. My Fourth Reaſon is, That there is no Legal Damages occaſion'd by the Sheriff. The Damages laid in the Declaration are,

1. *Being kept from Sitting in the Houſe.*

2. *The Pains and Charges he was put unto to get his Admittance into the Houſe.*

1. That of his being kept from Siting in the Houſe, is as much every Man's Damage in the whole County, nay in the whole Kingdom; and any Man elſe might as well have an Action for it as the Member Choſen.

To Sit in Parliament is a Service in the Member, for the Benefit of the King and Kingdom; and not for the Profit of the Member.

It is a Rule in Law, that no particular Man may bring an Action for a Nuſance to the King's High-way; becauſe all the Men in *England* might as well have Actions which would be Infinite; and therefore ſuch an Offence is Puniſhable only by Indictment, except there be Special Loſs occaſion'd by that Nuſance.

For the ſame Reaſon, the Excluſion of a Member from the Houſe being as much Damage to all Men in *England* as to himſelf: He nor any Man elſe can have an Action for it, but it is puniſhable upon the Publick Score, and not otherwiſe.

For this Reaſon was the *Statute* 23. *H.* 6. wiſely conſider'd, by that Statute the Action is not given to the Party for his particular Damage; but the Action given is a Popular Action, only the Party Griev'd hath a Preference for Six Months; but if he do not Sue in that time, every Man elſe is at Liberty to recover the ſame Sum.

2. The other Point of Damage is the Pains and Charges he was put unto, and that is not occaſion'd by the Sheriff, but by the Deliberation of the Houſe. Why ſhould the Sheriff Pay for that? It may be if the Parliament had ſent for the Sheriff the firſt Day, and blam'd the Double Return, he would have ventur'd to Determine the Matter ſpeedily, and there ſhould have been no Cauſe of Complaint for Delay; but the Parliament ſaw ſo much Cauſe of Doubt, that they think it not fit to put the Sheriff to Determine, but to reſolve to examine the Matter, and give him Directions that may guide him in mending his Return; thereupon they give a Day to the Parties on both Sides, and finding the Matter of long Examination, and withal Difficult, they Deliberate upon it.

It

It ſeems very unreaſonable the Sheriff ſhould be made Pay for this, which he did not occaſion; but was a Courſe taken by the Parliament for their own Satisfaction, who found no fault in the Sheriff for putting them to all that Trouble.

Suppoſe Sir *Samuel Barnardiſton* had been Return'd alone, and the Lord *Huntingtowr* had Petitioned againſt that Return, there had been the ſame Charge to have defended that Return; ſo that it was the Conteſt of the oppoſite Party that occaſioned the Charge, the Deliberation of the Parliament that occaſion'd the Delay; but neither of them can be imputed to the Sheriff.

I cannot difference this Caſe from the Caſe of bringing an Action againſt a Jury, for maliciouſly, knowingly, and on purpoſe to put the Party to Charges, finding a Matter ſpecially whereby great Delay and great Expences were, before the Party could obtain Judgment; and yet I think no Man will affirm that an Action will lie in this Caſe.

In this Caſe the Damages are found Entire, ſo that if both Parts, *viz.* the not Sitting in the Houſe, and the Pains and Charges are not Actionable Cauſes of Damages; it will be Intended the Jury gave for both, and ſo the Judgment is for that Cauſe Erroneous.

I ſuppoſe the Wages of Parliament will not be mention'd for Damages, for in moſt Places they are only Imaginary, being not Demanded; but if there were to be any Conſideration of them, it will not alter this Caſe; for upon this Return they are due as from the Firſt Day, and ſo no Damage can be pretended upon that Score.

5. My Fifth Reaſon is drawn from the *Statute* of 23. *H.* 6. which has been ſo often mention'd; that Statute is a great Evidence to me, that no Action lay by the Common-Law againſt a Sheriff, for a Falſe Return of a Writ of Election to the Parliament; and this Evidence is much ſtrengthned by the Obſervation that hath been made, that never any Action was brought otherwiſe than upon that Statute.

I muſt admit, that if an Action lay by the Common-Law, this Statute hath not taken it away, for there are no Negative Words in the Statute; but it is not likely the Parliament would have made that Law, if there had been any Remedy for the Party before.

The Statute obſerves that ſome Laws had been made before for preventing Falſe Returns, but there was not convenient Remedy for the Party griev'd, and therefore gives him an Action for 100 *l.* If the Courts of Juſtice had by the Common-Laws Juriſdiction to examine Miſdemeanors concerning the Returns of Sheriffs to the Parliament: What needed the Parliament to be ſo Elaborate to provide Law after Law, to give them Power therein, and at laſt to the Griev'd an Action? Can any Man imagine but that the Parliament took the Law to be that the Party was without Remedy? I know Preambles of Acts of Parliament are not always Goſpel, but it becomes us, I am ſure, to have Reſpect to them, and not to impute any Falſity or Failing to them, eſpecially where conſtant Uſage ſpeaks for them.

It has been Objected that in those Times it was Reckon'd a Damage, to be Return'd to serve in Parliament, which is the Reason that no Man then did bring his Action against the Sheriffs for Returning another in his stead. This cannot be true, for the Statute calls him the Party Griev'd, and is Elaborate in providing Convenient Remedy for him; and we see by the many Statutes about those Times, that it was Mischief very frequent, and there wanted no Occasion for those Actions; which does extreamly strengthen the Argument of the Non-User of this pretended Common-Law.

An Action upon the Case, where it may be brought, is a Plaister that fits its self for all Times and all Sores; and if such an Action might then have been brought, there was no need for the Parliament to provide a Convenient Remedy.

By *Littleton*'s Rule, often mention'd by my Brothers, we may conclude this Action will not lie; for if such an Action had lain, it would have been brought before this time.

In the Case of *Buckley* against *Rice Thomas*, in *Plowden's Commentaries*, 118, which appears to be so elaborately Argued both at Bar and Bench; if this Common-Law had been thought upon, they might have prevented the Question, whether the Sheriffs of *Wales* were bound by the *Statute* 23. *H.* 6?

It seems plain to me that the Makers of the said Statute were Ignorant of this Common-Law, and yet my Brother *Thurland* observes the Judges in those Times, usually assisted in the Penning of the Laws.

The Judges and Councel in the time of *Buckley*'s Case, were ignorant of this Common-Law, else it would have been mention'd in the Argument of that Case.

This Common-Law was never Reveal'd, that I find, until a Time there were divers orher New Lights: I mean these Times, when *Nevil* brought an Action for a False Reeurn against *Stroud*, during the late Troubles; but in those Times it could never obtain Judgment. I have heard that the Court of Common-Pleas sent the Record to the Parliament, as a Case too Difficult for the Courts of Common-Law to Determine.

The *Statute* of 23. *H.* 6. is not only Evidence that no such Action lay at the Common-Law; but in my Opinion is not consistent with any Remedy at the Common-Law, unless it be allow'd that the Party shall be doubly Punished,

If the Party Griev'd has brought his Action upon the Statute and recovered, it was admitted by the Councel, that no Action can be brought at the Common-Law, nor *E' Contra* can he Recover by the Statute, after he has Recovered by the Common-Law, because *Nemo bis punitur pro eodem delicto.*

So far it stands well, but suppose the Party Grieved has let slip his time of Three Months, and then a Third Person bring a Popular Action, and Recovers 100 *l.* upon the Statute, there is nothing can barr the Party Grieved from his Action at the Common-Law, for his Sitting still will not Conclude him; no Statute of Limitations extending to this Case,

and

and if it be ſo, then muſt the Party, beſides his Fine and Impriſonment, be doubly puniſhed by this Statute; which was made as the Letter of it Imports, becauſe there wanted Convenient Remedy.

And now I am Diſcourſing of this Statute, I muſt obſerve the great Wiſdom of the Courſe of Parliament in theſe Caſes, which hath in great Meaſure prevented the bringing Actions againſt Sheriffs, even upon this Statute.

Where the Sheriff miſtakes the Perſon in his Return, he incurrs the Penalty of 23, *H.* 6. tho' it be without any Malice; and it may happen that were 21 Electors, and 20 of the other; the Sheriff Returns him that hath 21, and the Parliament adjudging an Incapacity in 2 of the 21, may Determine that he that had the 20 Voices was duly Choſen; in ſuch Caſe the Sheriff hath made a Falſe Return within the Penalty of the Statute 23. *H.* 6. and no Evidence ſhall be given againſt the Determination of the Parliament.

This was a very hard Caſe for the Sheriff, and if we were lyable to ſuch a Miſchief, many a paſt Sheriff might be awaken'd that takes himſelf to be ſecure.

But the Courſe of Parliament prevents this as it is Reaſon, for immediately upon their Determination, they ſend for the Sheriff, and cauſe him to amend his Return; and thence forward the amended Return is the Sheriffs Return, and there is no Record that can Warrant any Action to be brought for a Falſe Return: As when the Marſhal of the *King's-Bench* or Warden of the *Fleet* have made an Improvident Return, omitting ſome Cauſes wherewith the Priſoner ſtood Charg'd in their Cuſtody, whereby they became lyable to Action; they frequently move the Court to amend the Return, and when the Return is Amended, all is ſet Right, for there is no Averring againſt a Record: In like manner, when the Sheriff hath Amended his Return, he is ſecure from any Action upon that Occaſion.

By this means there has of late years been no recovery upon the Statute, becauſe all Perſons chooſe rather to compel the Sheriff to amend his Return, that they might be admitted to ſit in the Houſe, than to take their Remedy upon the Statute, and no man can recover upon the Statute firſt, and have afterwards their Return amended, for I have been told, that by the Courſe of Parliament, unleſs the Petition be lodg'd within in ſome few days after the Return, it cannot be received afterwards. So that a Man cannot upon that Statute have Remedy at Law, and alſo in Parliament which ſeems to be wiſely provided to prevent any Contrariety of Determinations.

This Statute of 23. *H.* 6. furniſh'd thoſe that Argued for this Action with one Argument, which doth now vaniſh; they ſaid that all the Inconveniencies that could be objected to this Action, were the ſame upon the *Statute* of 23. *H.* 6. *viz.* That upon that Statute the Right Election muſt be examin'd upon a Tryal, where there might be a Contrariety of Determinations; for it appears by what I have ſaid, that there can be no Contrariety of Determinations.

And

And there are other Inconveniences in the Remedy by the Common-Law, which are not in the Remedy given by the Statute, the Sum to be recover'd is Limited, the Informer hath a time prefix'd, ſo that there are Bounds ſet which cannot be exceeded; but the Remedy by the Common-Law is without Limitation of Time, which is Conſiderable; for all Sheriffs that ever made any Return, otherwiſe than the Parliament Determin'd, will be lyable during their whole Lives, to them that will call them to Account for it; I ſay this is without Limitation of Time, without Meaſure of Damages, or any Rules contain'd in a Written Law; it depends upon a general Notion of Remedy, which may be enlarged by Conſtruction, as it is now introduced without Preſident.

To finiſh my Obſervation upon this Statute? I ſay it is great Wiſdom in the Parliament to call the Sheriff to Amend the Return, and to prevent any Remedy upon the Statute 23. *H.* 6. for I do not ſee that the Rules of Law, concerning Elections, are ſo manifeſtly clear and known that it is fit that the Sheriff ſhould upon all Returns that are Corrected by the *Parliament*, pay the Reckoning of the Conteſt.

6. I have a ſixth Reaſon againſt this Action, which is becauſe the Sheriff is not admitted to take Security to ſave him harmleſs in ſuch Caſes, I take this Reaſon to be *Inſtar Omnium*, and there needs no other in the Caſe.

It were the moſt unreaſonable and grievous thing in the World, that the Sheriffs ſhould be bound to Act without any Deliberation, and not to be allow'd to take any Security, and yet be liable to an Action which way ſoever he takes, there is no Courſe can avoid it, but this of a Double Return, as I have before ſhewn.

It has not been ſaid, by any that Argued the other way, That the *Sheriff* may take Security; and, I ſuppoſe, will not be ſaid, for it would be a dangerous Courſe for *Parliaments*, for then the moſt Litigious Man muſt be Return'd, and not he which is truly Choſen.

If the *Sheriff* may not take Security, the Law muſt be his Security. It was an Argument us'd by my Brother *Ellis*, That becauſe the Law impoſes an Officer, to wit, the *Sheriff*, there the Law muſt give the Party an Action againſt that Officer, if he Miſdemean himſelf, the Argument does not hold Univerſally, for the Law impoſes a Judge, and yet no Action lies againſt him; but the Reaſon of that Argument, if turn'd the other way, is Irrefragable, as thus: The Law will not ſuffer the Sheriff to take a Security, therefore the Law muſt be his Security, elſe it were a moſt unreaſonable Law; this Reaſon of it ſelf is ſufficient to bear the whole Caſe, for no Caſe can be put in our Law where a Man is compell'd to Judge without Deliberation; he cannot take Security, and yet ſhall be lyable to an Action.

I have two more Reaſons to add, upon which I lay great Weight, tho' they depend not upon any Particular Circumſtances of this Caſe, but the general Conſideration of it.

1. *That it is a New Invention.*
2. *That it Relates to the Parliament.*

1. As

1. As it is a *New Invention* it ought to be Examin'd very ſtrictly, and have no Allowance of Favour at the End, and it will have the ſame Fortune that many other Novelties heretofore attempted in our Law, have had.

Actions upon the Caſe have ſometimes been revived in new Caſes, where it ſtands with the Rules of Law, and no Inconvenience appears, but they have been more often Rejected: I ſhall Inſtance ſome Caſes that have been Rejected, becauſe it will be Manifeſt by them, that all the Arguments and Poſitions laid down by my Brothers that would ſupport the Action, are as well applicable to ſevcral Caſes that have been already rejected, as to the Caſe at Bar.

An Action upon the Caſe was brought againſt a Grand Jury-Man, for falſly and maliciouſly conſpiring to Indite another, and adjudged it would not lie.

Againſt a Witneſs for Teſtifying falſly and maliciouſly.

Againſt a Judge for Acting falſly and maliciouſly, but Adjudged that no Action wou'd lie in thoſe Caſes.

Theſe Three Inſtances are applicable to every Argument urg'd for this Action: The Arguments my Brothers made in depreſſing Falſity and Malice, thoſe which they made from the Compariſon of other Actions upon the Caſe a *Minore ad Majus*; the Argument that becauſe the Law Impoſes the Officer, it will puniſh the Malice, has the ſame Force in the Caſe of a Judge, Indictor or Witneſs, and yet my Brothers admit in thoſe Caſes an Action will not lie, which ſhews the Invalidity of thoſe Arguments.

Now I ſhall give other Inſtances, where Actions upon the Caſe have been Rejected for Novelty, and Reaſons of Inconvenience.

An action of the Caſe was brought againſt the Lord of a Mannor for not admitting a Copy-holder, and it was adjudg'd it would not lie. *Cro. Jac.* 368.

There was a Verdict found, and Damages given by the Jury in that Caſe, the Lord is compellable in *Chancery* to admit a Copy-holder, and what harm would it have been, if there might have been a remedy given by the common Law, there being a Cuſtom broken, by which the Lord was bound. The Reaſons of the Book are, becauſe it was a Novelty, and it would be vexatious, if every Copy-holder ſhould have an Action againſt the Lord, when he refuſed to admit him upon his own Terms.

It has been adjudged that an Action upon the Caſe will not lie for the Breach of a Truſt, becauſe the Common Law cannot try what a Truſt is; but if ſuch Actions were allow'd, the Law might declare that to be a Truſt, which the Court of *Chancery*, which properly Judges of Truſts, might ſay is none; and where the Common Law cannot examine the Principal Matter, the Damages that were but dependant upon it ſhall not be regarded.

Anthony Maddiſon brought an Action againſt *Skipwith*, for maliciouſly killing Sir *Tho. Wortley*, the Caſe was thus; The Plaintiff was a young Lawyer that had expended all his Gains in the Purchaſe of a Rent that was determinable, upon the Death of Sir *Tho. Wortley*; *Skipwith* quarrell'd with Sir *Thomas Wortley* about a Miſtreſs, and kill'd him, whereby *Maddiſon* loſt his Rent; it was held the Action would not lie, tho' it were laid to be done maliciouſly, on purpoſe to determine the Plaintiffs Rent.

I obſerv'd in that Caſe, that altho' Mr. *Maddiſon* knew very well that there

was a Miſtreſs in the Caſe, and that the Rent was not aim'd at; yet he would fain try his Fortune in the Suit, thinking, that a Jury perhaps out of —— Compaſſion to him, or to diſcourage the like Facts, might make the Manſlayer pay him for his Loſs: But the Judges would not ſuffer it to go on, it being a meer Device and a new fangled Action.

It hath been held that an Action will not lie againſt a Parſon for Suing for Tythes in Kind, knowing that there was a *Modus*, becauſe it might then be perilous for any Parſon to inſiſt upon his Right.

It was held by the Court of *Common-Pleas*, that no Action will lie for ſuing an Attorney, knowing in another Court againſt his Privilege; for his Means to enjoy his privilege is to claim it by Writ of Privilege; and he is not bound to claim his Privilege, nor can his Adverſary know he will claim it.

An Action was lately brought in the *Kings-Bench* (as I have heard) for delaying a Poſt-Letter maliciouſly, whereby the Plaintiff wanted Intelligence that might have been of great Advantage to him. The Court diſcountenanc'd the Action, ſo that it proceeded no further. It was then ſaid (as I heard) to this effect, That if ſuch Preſidents were admitted, there could hardly be any Dealing or Correſpondence but might be matter of Actions at Law; and altho' the Caſe depended upon proof of particular Malice, and the Defendant will be acquitted if his Caſe be not odious; yet we muſt conſider there, that there is both Charge and Vexation of Mind, that attends the Defence of a juſt Cauſe, and we muſt not ſubject Men for all their Actions to ſuch Trouble and Hazard.

Theſe Inſtances ſhew, that altho' an Action upon the Caſe be eſteemed a Catholition, yet when Actions have been apply'd to new Caſes, they have always been ſtrictly examin'd, and upon Conſiderations of Juſtice or Inconvenience they have been many times rejected.

For, tho' the Law advances Remedies, as my Brothers obſerved, yet it is with Conſideration, that Vexation be not more advanced than Remedy.

It is my Opinion that no new Device ever was or can be introduced into the Law, but Abſurdities and Difficulties ariſe upon it, which were not foreſeen, which makes me Jealous of admitting Novelties. But,

2. In Matters relating to the Parliament (which is my ſecond ground) there is no need of introducing Novelties, for the Parliament can provide new Laws to anſwer any Miſchief that ariſe, and it ought to be left to them to do it.

Eſpecially in a Caſe of this Nature concerning Elections which the Parliament have already taken care of, and preſcrib'd Remedies by the ſeveral Statutes that have been made concerning them, I ſay, in ſuch a Caſe, there is little need to ſtrain the Law.

The Judges in all times have been tender of meddling with Matters relateing to Parliament. I do not find that ever they try'd Elections, but where Statutes give them expreſs Power; or that they ever examin'd the Behaviour of a Sheriff, or any Officer of the Parliament, but upon thoſe Statutes; and in *Brounker's* Caſe, *Dyer*, 168, the Statute was their Rule in the *Star-Chamber*, and they inflicted the ſame Puniſhment that is appointed by that Statute.

If

If we ſhall allow general Caſes (as an Action upon the Caſe is) to be apply'd to Caſes relating to the Parliament, we ſhall at laſt invade Privileges of Parliament, and that great Privilege of judging of their own Privileges.

Suppoſe an Action ſhould be brought in time of Prorogation againſt a Member of Parliament, for that he falſly and maliciouſly did exhibit a Complaint of Breach of privilege to the Parliament, whereby the *Party* was ſent for in Cuſtody, and loſt his Liberty, and was put to great Charges to acquit himſelf, and was acquitted by the Parliament.

If upon ſuch a Caſe the Jury ſhould find the Defendant guilty, Why ſhould not that Action be maintain'd as well as this at Bar? It may be ſaid for that Action, that the Judgment of the Parliament is follow'd; and the privilege is not try'd at Law, but determin'd. 1. In the Houſe. 2*dly*, It may be ſaid the *Party* has no other way to recover his Charges.

It ſhould be dangerous to admit ſuch an Action, for then there would be peril in claiming Privilege; for if the *Party* complain'd of, had the Fortune to be acquitted by the Houſe, the Member that made the Complaint would be at the Mercy of the Jury, as to the point of Malice and Quantity of Damages. Such a Preſident I ſuppoſe wou'd not pleaſe the Parliament, and yet it may with more Juſtice be the ſecond Caſe, than this at the Bar the firſt.

Actions may be brought for giving Parliament Protections wrongfully. Actions may be brought againſt the Clerk of the Parliament, Serjeant at Armes, and Speaker, for ought I know, for Executing their Offices amiſs with Averments of Malice and Damage; and muſt Judges and Juries determine what they ought to do by their Officers? This is in effect preſcribing Rules to the Parliament for them to act by.

It cannot be ſeen whither we ſhall be drawn, if we meddle with Matters of Parliament in Actions at Law. Therefore in my Judgment the only ſafety is in thoſe Bounds that are warranted by Acts of Parliament or conſtant Practice.

Suppoſe this Action had been brought before the Election had been decided in the Houſe, and the Jury had found one Way, and the Parliament had Determin'd contrary, how Inconſiſtent had this been?

But it was ſaid in the *King's-Bench*, that the Court would not try it before the Parliament had Determin'd the Election, and then that cannot be Conteſted, but the Judgment of the Parliament muſt be follow'd; and my Brother *Ellis* but now ſaid, *Surely no Man will be ſo Indiſcreet as to bring ſuch an Action before the Parliament hath Determin'd it, and the Court will not Try it before ſuch time as the Election be Determin'd in a proper Way.*

In my Opinion this was not rightly conſider'd, for how can the Court ſtay any Suit to expect the Determination of the Parliament? And what Reaſon or Juſtice is there, who is no Party call'd to anſwer in the Parliament ſhould be concluded in any thing by a Judgment between other Parties, to defend himſelf from a Demand of Damages in a Court of Law, where Witneſſes are not Examin'd upon Oath, which they cannot be in the Commons Houſe?

There is no Reaſon the Suit of Law ſhould ſtay till the Houſe have Determin'd the Election, if the Determination of the Houſe be not Concluſive in that Suit.

And for the Diſcretion of the Parties that are like to bring ſuch Actions I cannot depend upon it; for I ſee in this Age, ſome Men will inſiſt upon their private Rights, to the hindrance of Publick Affairs of higher Conſequence than any that come before the Courts in *Weſtminſter-Hall.*

It may be there will not want Men that will preſs us to Judge in ſuch Caſes, and not only before the Parliament have Determin'd, but againſt what the Parliament have Determin'd; and will tell us that the Sheriff was no Party, that Witneſſes were not there Examin'd upon Oath, and produce Arguments from Antiquity which we ſhall be loath to Judge of.

I can ſee no other way to avoid Conſequences derogatory to the Honour of the Parliament, but to reject the Action; and all others that ſhall relate either to the Proceedings or Privilege of Parliament, as our Predeceſſors have done.

For if we ſhall admit general Remedies in Matters relating to the Parliament, we muſt ſet bounds how far they ſhall go, which is a dangerous Province, for if we Err, Privilege of Parliament will be invaded, which we ought not any way to endamage.

This I ſpeak of general Remedies: Now I will conſider this particular Caſe, which in my Opinion, would bring Danger and Diſhonour to the Parliament.

It is Diſhonourable to the Parliament that there ſhould be no Protection in their Service; I have ſhewn that the Sheriff can be ſafe in no Caſe, if he ſhall be Sued in ſuch a Caſe as this: And can there be a greater Reproach than that there is no ſafety in their Service? No body can ſerve them cheerfully and willingly at that Rate.

It has been objected that the Sheriff is not their Officer, but is the Officer of the Court of *Chancery*, which ſends forth the Writs and receives the Returns. The Argument is plauſible, but will not paſs in the Parliament; for they ſay the Court of *Chancery* is the Repoſitory for their Writs, but will not allow them to Iſſue without Warrant from the Houſe: They will not ſuffer the Court of *Chancery* to meddle with the Returns or the Sheriff. The Parliament ſends immediate Order to the Sheriff, if the Return be too ſlow, they direct the Sheriff to Amend his Return, and they puniſh the Sheriff where they find him faulty; ſo that it appears they exerciſe an immediate Juriſdiction over the Sheriff. And I ſuppoſe they would Judge it very Falſe Doctrine for us to (nor indeed can we any way) meddle with the Returns or the Officer.

Admitting the Sheriff to act in Returns as the Officer of the Parliament; It concerns them that he ſhould be lyable to no other Puniſhment but what they Inflict, otherwiſe they cannot expect to be obey'd.

To have others Judge when their Servants do well, will be to have others give Rules to their Servants and Service, which they will think Inconvenient.

Let it be conſidered how hard a Task Sheriffs have in their Elections of Knights to the Parliament: The Appearance commonly is very Numerous, the Parties Conteſting very Violent, the Proceeding Tumultuous, the Polling ſometimes is at ſeveral Places at once; ſo that the Sheriff can hardly be a Witneſs of the Action, and if the Diſpute be in the Houſe of Commons he is no Party to it. If after all this the Sheriff, who cannot indemnify himſelf by Security,

Security, ſhall be lyable to an Action, the Service of the Parliament may be reckon'd a miſerable Slavery; which is not for their Honour.

As this is Diſhonourable, ſo it is Dangerous to Parliaments; it concerns the Kingdom that Returns to the Parliament ſhould be upright and impartial, and that they may be ſo, the Sheriff ſhould be ſecure from all Fears.

Judges are not lyable to Actions, that they may Proceed uprightly and impartially; if they were ſubject to Suits for their Judgments, there is that earneſtneſs and confidence on both ſides, that one ſide would be diſſatisfy'd and trouble them, and they could not diſcharge their Duty without Apprehenſions of Diſquiet.

If the Sheriff be diſpos'd to Actions thus, let us conſider what and whom he is to fear: He may fear the Suit of the Party, and he may fear the Suit of the King. It follows neceſſarily that if an Action lies, an Information, for the King will alſo lie for the Miſdemeanor of his Office, if it be not a Caſe privileged by the Complexion of it, as Parliamentary from being Examin'd in *Weſtminſter-Hall*, but that he may be puniſh'd at the Suit of the Party, he may certainly as well be puniſh'd at the Suit of the King, If ſo, where is the Sheriff's Security? Will his own Innocence ſecure him? That will be Try'd by a Jury of the County where the Parliament ſits; who are, it may be, Strangers to him as well as to the Matter, or by a Jury of the Country where the Election was; where, it may be, they will be of an oppoſite Party; the Plaintiff may wait his opportunity, and queſtion him Twenty Years after: and if he be Condemn'd his Puniſhment is unlimited, a Fine may be ſet any height for the King, and Damages may be given to any Value for the Party: Where is his Security upon ſuch Proceedings? Will he not be more afraid of ſuch Puniſhment out of Parliament than of any Puniſhment in Parliament? Will not, nay may not his Terror make him deſire to pleaſe them that can puniſh him out of Parliament, rather than to do Right? Will not that be dangerous to the Conſtitution of Parliaments?

As the Puniſhment out of Parliament may be a Puniſhment to thoſe who mean well, ſo colourable Puniſhments may be as miſchievous on the other ſide; for they may prevent any Puniſhment, for *Nemo bis punitur pro eodem delicto*, they may ſerve for Protection of Men that do it: When it is ſeriouſly weigh'd of what Conſequence this may be, the Caſe at Bar will not be thought a Caſe fit to be receiv'd by the Judges without the Countenance of Law.

They object here is Malice found by the Verdict, and that there is no Danger or Inconvenience that accrews by reaſon Malice, but ought to be Puniſh'd.

This Objection fortifyes my Opinion; for Malice, upon which they would have the Scales turn in this Caſe is not a thing Demonſtrative, but Interpretative, and lies in Opinion, ſo that it may give an Handle to any Man to puniſh another by.

The Inſtance of this very Caſe ſhews, that a good Man may reaſonably be afraid of the Event of his Defence in ſuch a Caſe.

For altho' the Matter was of great Examination in Parliament, and at laſt decided but by few Voices, and no obſervation of the Sheriffs Miſcarriage there, tho' it appear'd upon the Tryal (which I may ſay being preſent there) that the

Sheriff

Sheriff was guided by the Advice of his Friends, of Council and of Parliament Men, that told him the only safe Course was to make a double Return, yet the Jury Condemn'd him to pay 800 *l.* against the Expectation of the Court; for the Judges that were present at the Tryal did all declare publickly that they would not have given that Verdict.

The Jury heard all the Evidence the Jury could go upon, for being of a remote County to the place of Election; the Jury could know nothing of their own knowledge, and yet the Judges concurr'd not with the Jury in their Opinion.

I know we are not to examine the Truth of the Verdict, we must take it for Gospel, neither do any Partiality in this particular lead me in Judgment; but I shew it as an Instance that Malice is not demonstrative; Mens Minds may be mistaken, and Innocent Men may therefore have reason to be afraid, especially in Ill Times, and may use such Means for their Safety as may not be convenient for Parliaments.

But there can be Danger or Inconvenience in the Censure of the Parliament that represents the whole Kingdom, who hitherto have alone exercis'd this Power, and who may at any time Reform the Law, if the present Practice be any way Inconvenient.

Upon these Reasons which I have produc'd I ground my Opinion; Now it will be necessary to weigh what hath been said in Opposition to it.

The Arguments urg'd on the other side, related either to the Ingredients or Circumstances of this Action, or to the Foundation or Substance of it.

I call the Ingredients and Circumstances of the Action, that it is laid with these Words; *Falso*, *Malitiose*, *Deceptive*, *Scienter*, And that there is a Verdict in this Case, and are Damages found.

The words *Falso*, *Malitiose*, *& Deceptive*, will sometimes make a Thing Actionable, which is not so in it self, without Malice prov'd, tho' there be the same Damage to the Party.

As where a Man causes another to be falsly Indicted, yet if it be not *Malitiose*, no Action lies, tho' there be the same Trouble, Charge and Damage in one Case as the other.

But it is only where a Man is a voluntary Agent, for if a Man be Compellable to act, you cannot molest him upon any Averment of Malice; as if a Grand Jury-Man causes another to be Indicted, tho' you aver Malice, you cannot have an Action against him; so for a Witness that doth testify, or a Judge that judgeth.

In the Case at Bar, the Sheriff is Compellable to act, and not barely as a Minister to send the Indenture; but as a Judge to say which is the Major Part; and if he mistakes, there is no reason it should subject him to an Action upon an Artificial Averment of Malice.

I remember in *Shepherd* and *Wakeman's* Case in the *Kings-Bench*, Mr. Justice *Windham* said well, that the words *Falso & Malitiose* were grown words of course, and put into every Action; so that to his knowledge Juries many times had no regard to them, that he look'd upon them as Words of Form.

If we should make the words *Falso & Malitiose* support an Action without a fit Subject Matter, all the Actions of Mankind would be liable to Suit and Vexation, they that have the Cooking (as we call it) of Declarations in Actions of the Case, if they be skilful in their Art, will be sure to put in the words *Falso & Malitiose*, let the Case be what it will they are here Pepper and Vinegar in a Cook's hand, that help to make Sawce for any Meat, but will not make a Dish of themselves.

Falso & Malitiose will not enable an Action against a Judge. Nor

Nor againſt an Indictor or Witneſs, nor where words are not Actionable, tho' the Plaintiff hath a Verdict and Damages found, nor for a Breach of Truſt, which is *alieni fori*.

The reaſon of every one of theſe Caſes holds in the Caſe at Bar. Therefore it ought to have the ſame Reſolution.

As to the word *Scienter*, it hath weight ſometimes, as if an Action be brought for keeping a Dog that Worried others Sheep, *Sciens Canem ad mordend' Oves conſuetud.* or for detaining the Servant or Wife of another; *Scienter* in theſe Caſes, if the Defendant hath been told that the Dog did worry Sheep, or that it was the Servant or Wife of another, tho' it may be he did not believe it, yet it was *Scienter*, for the word implies no more than having Notice; and in thoſe Actions he muſt inform himſelf at his peril, and may if he doubts, avoid Danger, by putting away thoſe things which give Offence. But in this Caſe he could receive Information by none, and is not to believe or disbelieve any body, but is bound to judge of the thing himſelf, and to act according to his Judgment, ſo that no proof could be made of the *Scienter*, for one ſide tells him the Election was one way, and the other ſide tells him it is the other way, but he being preſent to the whole Action, muſt follow the Dictates of his own Judgment; Hence it appears *Scienter* in this Caſe is an empty word, not referring to Notice of a Fact, but of Matter to Judgment, which cannot any way be prov'd.

It has been often urg'd that this Caſe is ſtronger by being after a Verdict and Damages found by the Jury, and it has been ſaid that perhaps upon a Demurrer, it might have been found more doubtful.

The Caſe is the ſame to me upon a Verdict that it ſhould have been upon a general Demurrer, and no ſtronger, for a Demurrer is the Confeſſion of the Party of all that can be prov'd, or can poſſibly be found upon that Declaration.

It is my Lord *Coke*'s Advice in *Cromwell*'s Caſe, 4th *part.* 14 *a.* never to Demur to a Declaration, if there be any hopes of the Matter of Fact; for the Matter in Law will as well ſerve after a Verdict, as upon Demurrer.

The finding the Plaintiff's Damages adds no ſtrength to the Caſe, for we ſee every day upon Actions for Words, tho' the Jury find the Defendant guilty for ſpeaking Words *Falſo & Malitioſe*, and find it to be to the Plaintiffs great Damages, yet if the words are not ſuch as will bear an Action, the Court ſtays Judgment; and if Judgment happen to be given, it is reverſable for Error, which ſhews that the finding Damages by the Jury cannot make an Action better than if it were to be adjudged upon Demurrer.

I ſhall now conſider what hath been ſaid to maintain this Action upon the Main Subſtance and Foundation of it. They ſay this is a Caſe within the general Reaſon of the Common Law, for here is Malice, Falſity and Damage, and where they concur, there ought to be Remedy. And altho' this be a new Caſe, yet it ought not for that Reaſon to be rejected, for other kind of Actions have been newly introduc'd, and this is fit to be entertain'd as any.

My Brothers that argued even now for the Action ſhew'd great Learning and great Pains, and certainly have ſaid all that can be invented in ſupport of this Caſe, but as far as I could perceive, they have ſpoken upon general Notions to that purpoſe I juſt now mention'd: but nothing that I could obſerve applicable to the Reaſons and Differences I go upon.

As for the Rule they go upon, that where Falſity, Malice and Damage do concur, there muſt be Remedy; I confeſs it is true generally, but not univerſally, for it holds not in the Caſe of a Judge, nor an Indictor, nor a Witneſs, nor of Words that import not legal Slander, tho' they are found to bring Damage, as I have ſhewn before. And the Reaſons that exempt theſe Caſes from the general Rule have the ſame force in the Caſe at Bar.

I muſt confeſs the Judges have ſometimes entertain'd new kinds of Actions, but it was upon great Deliberation, and with great Diſcretion, where a general Convenience requir'd it.

If *Slade*'s Caſe were new (for my Brother *Thurland* truly it was ſaid in that Caſe, that there were infinite Numbers of Preſidents) that Caſe impowered the Common

Courſe

Course of Justice. Actions for Words that are said to be new, tho' they have been us'd some hundreds of years, are a necessary Means to preserve the Peace of the Kingdom. The Case of *Smith* and *Craschaw*, *Cro. Car.* 15. was a Case of general Concern, being that Prosecutions for Treasons may be against any Man and at any time.

But in the Case at Bar, neither the Peace of the Kingdom nor the Course of Justice is concern'd in general, but only the Administration of Officers of the Parliament in the Execution of Parliamentary Writs, and can never happen but in time of Parliament, and must of Necessity fall under the Notice of the Parliament; so that if the Law were Deficient it is to be presum'd the Parliament wou'd take care to supply it: Discretion requires us rather to that, than to introduce new Presidents upon such general Notions that cannot govern the Course of Parliament.

My Brother *Atkyns* said the Common-Law comply'd with the Genius of the Nation, I do not understand the Argument; Does the Common-Law change? Are we to Judge of the Changes of the Genius of the Nation? Whither may general Notions carry us at this Rate? For my own part I think, tho' the Common-Law be not Written, yet it is certain and not Arbitrary; We are Sworn to observe the Laws as they are, and I see not how we can Change them by our Judgments; and as for the Genius of the Nation, it will be best considered by the Parliament, who have Power of the Laws, and may bring us to a Complyance with it.

In the Case at Bar I look upon the Sheriff as a particular Officer of the Parliament, for the managing Elections, and as if he were not Sheriff: I look upon the Writ as if it were an Order of Parliament, and had not the Name of a Writ; I look upon the Course of Parliament, which we pretend not to know, to be incident to the Consideration of it; so that it stands not upon the General Notion of Remedy in the common Course of Justice.

The Arguments of the falling of the value of Money, whereby the Penalty of 100 *l.* provided by the 23. *H.* 6. is become inconsiderable, and the increase of the Estimation of being a Member of Parliament, if they were true, are Arguments to the Parliament to change the Law by increasing the Penalty, but we cannot do it.

My Brother *Maynard* in his Argument wou'd embolden us, telling us we are not to think the Case too hard for us, because of the Name or Course of Parliament, for Judges have punish'd Absentees: They may Determine what is a Parliament, what is an Act of Parliament, how long an Ordinance of Parliament shall continue, and may punish Trespasses done in the very Parliament.

I will not dispute the Truth of what he said in this, but if his Arguments were Artificial, he might have spared them; for they have no manner of effect to draw me beyond my Sphere.

I will not be afraid to determine any thing that I think proper for to judge, but seeing I cannot find the Courts of Justice have at any time medled with Cases of this Nature, but upon express Power given them by Acts of Parliament, I cannot consent to this President, I am confident when there is need, the Parliament will discern it, and make Laws to enlarge our Power, so far as they shall think convenient.

I see no harm that Sheriffs in the mean time should be safe from this new devis'd Action, which they call the Common-Law; if they misdemean themselves, they are answerable to the Parliament, whose Officers they be, or may be punish'd by the Statute made for Regulating Elections.

It is time for me to conclude: which I shall do by repeating the Opinion I at first deliver'd, (*viz.*) That this Judgment is not warranted by the Rules of Law; That this Judgment is not warranted by the Rules of Law, That it introduceth novelty of Dangerous Consequence, and therefore ought to be Revers'd.

Sepe viatorem nova non vetus orbita fallit.

Note, The Lord Chief Justice *Vaughan* and Lord Chief Baron *Turner*, both deceas'd, who in their Lives were Eminent Members of Parliament, were of the same Opinion; And the Judgment was accordingly Revers'd.

F I N I S.